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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. [redacted] 31

EDWARD J. GUNNING, PETITIONER,

vs.

GERTRUDE L. COOLEY.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Petitioner.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Edward J. Gunning, respectfully shows unto this Honorable Court:

This suit was instituted in the Supreme Court of the District of Columbia, against the defendant, a practicing physician, to recover damages in the sum of $25,000, for alleged malpractice.

The basis of the suit was the claim made in the declaration that the defendant negligently injected into

the plaintiff's ears a solution, not sweet oil, which was harmful, dangerous and destructive of the tissues and drums of the ears (R. pp. 2-3).

The defendant, both in his pleas and as a witness, denied the acts of negligence charged (R. pp. 5-50).

The theory of the plaintiff at the trial was that defendant had injected an *acid* into her ears.

The case was tried to a jury. The onus of proving the negligence charged and relied upon, rested upon the plaintiff.

Not being able to establish the charges made by her own testimony, plaintiff called as an expert witness in her behalf a specialist in the treatment of diseases of the ear, nose and throat.

This witness testified that in February, 1927, he made an examination of plaintiff, and that he also obtained from her the history of her case, that is, a statement from her as to the trouble from which she was suffering, and the treatment she had undergone for it, *including a statement by her to the effect that she had "had acid put in her ears"* (R. p. 22). On the stand he was also plied with all sorts of hypothetical questions, in which he was asked to assume the existence of many facts and the non-existence of many others, of which there was no proof. Notwithstanding all of this he testified *that at the time he made the examination of plaintiff and obtained from her the history of her case, he did not reach any conclusion as to the cause of the injury, and had not reached any conclusion in his own mind yet* (R. p. 28).

He further testified (R. p. 29):

"The putting of acids in the ear of the plaintiff would have practically the same effect on the external canal as it would have on the middle ear, if there was enough of it to hit on the side. In other words, if there was enough acid to go into the middle ear and fill it up, it would be bound to burn it as it went in. It would be destructive of the external canal, as it would be of the ear drum; there would be some tissue destroyed, undoubtedly. *When he examined the plaintiff he found the external canal in a normal condition.*"

This testimony of the only expert called in behalf of the plaintiff is absolutely supported by the testimony of two experts called in behalf of the defendant (R. pp. 33, 43).

In addition to this the plaintiff's expert testified to many other causes, that is, other than putting acid in the ears, that could have produced the condition of which plaintiff complained (R. pp. 23, 24, 28). This testimony accords with that of defendant's experts (R. pp. 28, 32, 43, 48, 52, 53, 58).

In addition to this we have the positive testimony of one of defendant's experts that in his opinion the cause of plaintiff's condition was a "chronic catarrhal otitis," probably due to two combined factors, one the poor ventilation of the nose, and, secondly, focal infection, most probably the teeth (R. pp. 32, 33). This opinion was based upon facts furnished by the plaintiff herself, and as a result of a physical examination of the plaintiff by the expert (R. p. 32).

Upon the whole case defendant moved the court to direct the jury to return a verdict in his favor on the following grounds:

1. That the plaintiff had failed to establish her case.

2. That a verdict in her favor must necessarily be based upon conjecture or guess work.

3. The testimony showed that the injury complained of might have resulted from several or more causes, for one or more of which the defendant could not be held liable.

The motion was overruled and exception duly noted (R. p. 59).

The case was submitted to the jury and resulted in a verdict for plaintiff in the sum of $10,000 (R. p. 5). Judgment was entered thereon, and an appeal to the Court of Appeals of the District was noted and perfected (R. p. 7).

II.

On January 7, 1929, the opinion and judgment of that Court, affirming the judgment of the Court below (not yet reported) was handed down by the Chief Justice, concurred in by Justice Van Orsdel (R. p. 74). The basis of this opinion is that there was sufficient evidence to take the case to the jury.

Mr. Justice Robb dissented upon the ground that *"there was no basis whatever for the verdict and judgment"* (Dissenting Opinion, R. p. 86).

In the concurring opinion filed by Mr. Justice Van Orsdel (R. p. 84), he says: "I concur in the opinion

affirming the judgment of the Trial Court. *I am forced to this conclusion notwithstanding my belief that a very grave injustice has been done in this case.* * * * A motion for a directed verdict challenges the sufficiency of the evidence to take the case to the jury. It presents a question of law for the Trial Court and the Appellate Court which alone can be determined by an analysis of the evidence.

It is a mere travesty to say that the Court is bound to send the case to the jury if there is any evidence tending to support the contention of the plaintiff and shut its eyes to the justice or injustice of a verdict resting upon such a flimsy basis. It it my fixed opinion as expressed on many occasions that the rule established in the decisions referred to and in many other decisions of this Court is too strict and should be modified to the extent of confiding in the Court the power to determine whether or not the evidence is sufficient to raise a responsible issue of fact capable of supporting a verdict that will meet the substantial ends of justice.

I trust that such a rule of procedure may yet be adopted by the unanimous concurrence of the Justices of this Court as will lift the Trial Justice in this District from a mere automaton to the exercise of his lawful and proper judicial function of seeing that cases are submitted to juries in accordance with such lawful rules of procedure as will elicit verdicts based upon substantial issues of fact rather than mere caprice or sympathy."

III.

The grounds upon which this petition are based are as follows:

1. The question of the liability of a physician for alleged negligence or malpractice is one of general importance, constantly arising in the Courts of this District, and the Federal Courts throughout the country.

A careful examination of the official reports of the decisions of this Court fails to disclose that the Court has ever passed upon the questions of law involved in the determination of the liability of a physician upon a charge of negligence or malpractice.

2. The Court of Appeals failed to make proper application of the opinion and judgment of that Court in the case of Levy vs. Vaughn, 42 App., D. C. 146, and of decisions of this Court in accordance with the principles thereof.

3. The Court in its opinion wrongfully determined the powers and duties of a Trial Justice, and in so doing misapplied applicable decisions of this Court.

4. The Court in its opinion assumes and holds that because there was some conflict in the testimony offered at the trial, the Trial Court was bound to submit the case to the jury for its determination, even though a "grave injustice" might thereby result to the defendant, and a verdict against him, not based upon "substantial issues of fact," but based upon

"mere caprice and sympathy" might result from such action on the part of the Trial Court. This assumption and holding resulted from a misapplication of applicable decisions of this Court.

IV.

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the District of Columbia, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court in the case entitled "Edward J. Gunning, Appellant, vs. Gertrude L. Cooley," to the end that said cause may be reviewed and determined by this Court, as provided by law; and your petitioner prays that the Judgment of the said Court of Appeals of the District of Columbia in said case may be reversed by this Honorable Court.

And your petitioner will ever pray.

EDWARD J. GUNNING,
By BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY.

DISTRICT OF COLUMBIA, *ss:*

H. Prescott Gatley, being first duly sworn, says: That he is attorney for the petitioner Edward J. Gunning; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

H. PRESCOTT GATLEY.

Subscribed and sworn to before me this 31" day of January, 1929.

NEENAH LAUB,
Notary Public, D. C.

We hereby certify that we have examined the foregoing petition for writ of certiorari and that, in our opinion, it is well founded in point of law and should be granted by this Honorable Court; and that the petition is not filed for purpose of delay.

H. PRESCOTT GATLEY,
BENJAMIN S. MINOR,
ARTHUR P. DRURY,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

Without setting forth *in extenso* the testimony of the expert witnesses called in the case (Pet. pp. 2, 3), we think it can be briefly and fairly summarized as follows:

1. The expert called by the plaintiff testified that with all of the knowledge which had come to him respecting the injury complained of by the plaintiff, he had not made up his mind what was the cause of that injury.

2. If acid had been placed in the ears of the plaintiff sufficient to have caused the injury complained of, there would necessarily have followed an injury to the external canals of the ears. The external canals of the ears were in a normal condition.

This testimony was substantiated by the expert witnesses called by the defendant.

3. The condition of plaintiff's ears was due to a chronic catarrhal otitis, probably due to two combined factors, poor ventilation of the nose, and focal infection, most probably the teeth. This was the testimony of one of the defendant's experts based upon facts furnished him by the plaintiff herself and a physical examination of plaintiff made by the witness.

It is respectfully submitted that before a physician can be held liable in damages for alleged negligence or

malpractice, there must be expert medical testimony to support the plaintiff's case.

> "Only those are qualified to testify as to whether there was negligence in the method of treatment who themselves possess the skill required to administer such treatment, and to them the jury must listen."
>
> McCoy *v.* Buck, 157 N. E. 456 (Indiana, 1927).

If the only expert called by the plaintiff is unable to advise the Court and jury what the cause of the plaintiff's injury was, and, if, as in this case, the testimony of that expert negatives the claim of the plaintiff that the injection of acid into her ears caused the injury complained of, how is it possible for a jury of laymen, unlearned in the sciences, to say affirmatively that the plaintiff has established her claim that the injury was caused in any such manner.

In the case of Levy *v.* Vaughn, reported in 42 App. D. C., 146, the Court adopted the reasoning of the opinion of the late Chief Justice Clabaugh, the Trial Justice, in directing a verdict for the defendant. That was a malpractice case where death resulted from the administration of ether. In that opinion it is said:

> "Therefore, with the facts staring you in the face that nobody says to this jury that this intestate died from the effects of ether, is it possible that the jury can say what the expert witnesses and all other witnesses in the case say that they cannot tell? Does the law mean that a jury can pass upon the cause of a death of a man, when those who ought to know cannot tell?

> The plaintiff's witnesses have said exactly the same thing that the witnesses for the defendant have said. Then, when all the witnesses concur in the statement that they cannot tell, on what theory of the law can the Court submit to a jury of twelve men, unlearned in the sciences, the question of determining as to condition, when the experts themselves cannot tell?"

Does the fact that in that case death ensued while in this case an alleged injury ensued, rob the reasoning of the late Chief Justice of all its soundness and logic?

See Dissenting Opinion Mr. Justice Robb (R. pp. 86, 87).

The instant case is much stronger for the defendant than the case referred to. As heretofore pointed out (Pet. p. 3), all of the experts testifying in the case were in agreement that other than putting acid in the ears, there were many causes that could have produced the injury of which plaintiff complained. For many of these causes the defendant could not possibly be held liable.

In the case of Bennett *v.* Washington Terminal Company, 55 App. D. C., 111, 113, an ordinary negligence case, where there was no definite testimony showing how the decedent met his death, whether he was killed by a train of the Pennsylvania Railroad or by an engine of the Washington Terminal Co., the Court of Appeals, following the decision of this Court in the case of Patton *v.* Texas & Pacific Ry. Co., 179 U. S., 658, in affirming the judgment of the trial court in

directing the jury to return a verdict in favor of the defendant, says:

> "No one saw Bennett struck. No one knows what he did after the time he was cut off from the view of the witness Arnold by the movement of the Pennsylvania train. Counsel for defendant advance the theory that he was in fact struck by that train and thrown on track 19, where he was run over by the shifting engine. This theory is as plausible as any other that can be indulged in this case. To have left the question of defendant's negligence to the jury would have opened up an endless realm for speculation and conjecture, for the building of inference upon inference and presumption upon presumption.
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> • • • • • • •
>
> "The presumption that the accident resulted from any one of these causes might be indulged. Where, as in this instance, the accident may have resulted from any one of a number of different causes, and in any one of a number of different ways, the court will not permit the jury to speculate as to how it occurred, and arrive at a verdict which at best would amount to a mere guess. It was incumbent upon the plaintiff to establish the negligence of the terminal company by affirmative proof."

This court in the Patton case, *supra*, at page 663, says:

> "• • • it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony

leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

II.

The basis of the majority opinion of the Court below is that inasmuch as there was a conflict in the testimony of the witnesses the Trial Justice was bound, under the previous decisions of that Court, to submit the case to the jury for its determination; that he lacked the power to deal with the case in such manner as would prevent "grave injustice" to the defendant, and, being a mere "automaton" he was compelled to leave the case to the decision of the jury even though, in so doing, his action would result in eliciting a verdict based, not upon *substantial issues of fact*, but rather upon *mere caprice and sympathy*.

We quite agree that by the verdict and judgment in this case a *grave injustice* was done the defendant. We likewise agree that such verdict was not based

upon the determination of *any substantial issue of fact.* We assert that its only basis was "*mere caprice and sympathy.*"

The concurring opinion filed herein evinces the hope that "such a rule of procedure may yet be adopted by the unanimous concurrence of the Justices of this Court as will *lift the Trial Justice* in this District from a mere *automaton* to his lawful and proper judicial function of seeing that cases are submitted to juries in accordance with such lawful rules of procedure *as will elict verdicts based upon substantial issues of fact rather than mere caprice and sympathy.*" (Italics ours.)

With profound respect for the opinion thus expressed we respectfully submit the adoption of any such rule is unnecessary. Trial Justices, according to the decisions of this Court, covering a long period of time, hereinafter referred to, not only have such *power,* but the *duty of exercising such power* rests upon them. If any Trial Justice in this District functions as a "*mere automaton*" he does so for one of two reasons:

1. Because he fails to realize the power vested in him, and the duty resting upon him by virtue thereof, or,

2. Realizing the power thus vested in him, and cognizant of such duty, he neglects to exercise the power and perform the duty.

As far back as the case of Pleasants *v.* Fant, 22 Wall., 116, this Court, in unequivocal terms, defines the duty of the trial court as follows:

"It is the *duty of the Court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial.*" • • •

"In the discharge of this duty it is the province of the Court, either before or after the verdict, to decide *whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor.*" (Italics ours.)

Again says the Court in the case of Patton *v.* Texas & Pacific Ry. Co., *supra,* in speaking with reference to the powers and duty of the trial judge:

"At the same time, *the judge is primarily responsible for the just outcome of the trial.* He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, *but one who in our jurisprudence stands charged with full responsibility.*" (Italics ours.)

The most effective way of exercising this power and performing this duty by trial judges is for them to determine "whether or not the evidence is sufficient to raise a responsible issue of fact capable of supporting a verdict that will meet the substantial ends of justice."

We admit that in the case at bar there was a conflict of testimony. But we do not admit that there was any substantial conflict of testimony with respect to any substantial or controlling issue in the case. We

do not deny the general rule laid down in the authorities referred to in the majority opinion of the Court. We respectfully deny its applicability to the case at bar, as it appears from the record. It is not every case where there is a conflict of testimony that should be submitted to a jury for determination. If that were so the power vested in trial judges and the duties resting upon them, as defined by the Supreme Court, are meaningless.

It is only where there is a substantial conflict of testimony respecting substantial and controlling issues of a case, and only where the state of the testimony would warrant or justify a verdict accordingly as the jury might determine the right and truth of such conflicting testimony, and where a verdict thus found would do substantial justice between the parties, that the court is justified in submitting a case to the jury for its determination. But where the state of the testimony is such that "grave injustice" to a party may result from a verdict or where a verdict may follow based upon "mere caprice or sympathy" the trial judge is never justified in letting the case go to the jury. *The trial judge stands charged with full responsibility to protect parties litigant against such results.*

In the case of Pleasants *vs.* Fant, *supra*, this Court in discussing the duty of the trial judge to decide whether the plaintiff has offered evidence *sufficient to support a verdict in his favor,* says the question is:

> "Not whether on all the evidence the preponderating weight is in his favor, that is the

> business of the jury, but conceding to all the evidence offered the greatest probative force to which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? * * * Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial granted? Such a proposition is absurd, and accordingly *we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury.*" (Italics ours.)

In speaking of the power of trial judges to direct verdicts and the duty of the court so to do, it is said in Oscanyon *vs.* Arms Co., 103 U. S., 261:

> "The practice is a wise one, it saves time and costs; *it gives a certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and jury, and fixes where it belongs the responsibility which should be assumed by the court.*" (Italics ours.)

See also:

Randall *vs.* B. & O. R. R. Co., 109 U. S., 478.
District of Columbia *vs.* Moulton, 182 U. S., 576.
Famous Smith *vs.* United States, 151 U. S., 55.

In Improvement Company *vs.* Munson, 14 Wall., 442, it is said:

> *"Nor are judges any longer required to submit a question to a jury merely because* SOME *evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury* CAN PROPERLY PROCEED *to find a verdict for the party producing it, upon whom the onus of proof is imposed."* (Italics ours.)

In Bowditch *vs.* Boston, 101 U. S., 16, it is said:

> "It is now the settled rule in the courts of the United States that whenever, in the trial of civil cases, it is clear that *the state of the evidence* is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, *it is the right and duty of the judge to direct the jury to find according to the views of the court.* Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice." (Italics ours.)

In Commissioners, etc., *vs.* Clark, 94 U. S. 278, it is said:

> *"Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence.* Ryder *vs.* Wombwell, Law Rep. 4 Ex. 39.
>
> *Decided cases may be found where it is held that if there is a* SCINTILLA *of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to-wit, that, before the evidence is left to the jury there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence but whether there is any upon which a jury can* PROPERLY *proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."* (Italics ours.)

In Coughran *vs.* Bigelow, 164 U. S. 301, it is said:

> "The foundation for those rulings was not in the constitutional right of a trial by jury, for *it has long been the doctrine* of this court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed, and that, *if the evidence be not sufficient* to warrant a recovery, IT IS THE *DUTY of the court to instruct the jury accordingly,* and,

> if the jury disregard such instruction, to set aside the verdict." (Italics ours.)

We respectfully submit in the light of these authorities and in view of the state of the record in the case, the trial court was imposed with the duty of directing a verdict in favor of the defendant. It had the power so to do and thereby protect the defendant from "grave injustice" and a verdict based, not upon substantial evidence establishing the charges made against him, but upon "mere caprice and sympathy." Having failed to exercise this power and to perform this duty it was within the power of the Court of Appeals, and the duty was imposed upon it, to correct this error and to right the wrong consequent upon it.

We have a determination of one Justice of the Court of Appeals that "there was no basis whatever for the verdict and judgment." We have also the determination of another justice, "that a very grave injustice has been done in this case," evidently founded upon the conviction that the verdict of the jury was not based upon the determination of any "responsible issue" in the case, but rather upon "mere caprice and sympathy"—a verdict that does not "meet the substantial ends of justice."

In this situation it is respectfully submitted this case should be determined according to the broad principles of justice and fairness laid down and consistently followed by this court in the foregoing cases, rather than upon the strict and narrow rule laid down in the opinion of the Chief Justice filed herein. If this

latter rule is to prevail we unhesitatingly say, as did Judge Thayer in Haire *vs.* Reese, 7 Phila., 140:

> "• • • God forbid that the law should apply any rule so rigorous and unjust as that to the relations and responsibilities arising out of this noble and humane profession."

Respectfully submitted,

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Appellant.

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